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THE TAX LAW OF NEW YORK.

THE NEW YORK TAX CASES

Supreme Court of the United States

OCTOBER TERM, 1923.

BASS, RATCLIFF & GRETTON, LIMITED, Plaintiff-in-Error, against STATE TAX COMMISSION, Defendant-in-Error.	No. 24.
GORHAM MANUFACTURING COMPANY, Appellant, against STATE TAX COMMISSION OF NEW YORK and CARL SHERMAN, individually and as Attorney General of the State of New York, Appellees.	No. 14.

BRIEF FOR PLAINTIFF-IN-ERROR AND APPELLANT.

These cases involve the question of the validity under the Constitution of the United States of

Article 9-A of the New York State Tax Law, and for this reason one brief is filed in both cases.

In the Bass case, a writ of error was allowed to the Supreme Court of the State of New York.

In the Gorham case, an appeal was taken from a final decree of the United States District Court for the Southern District of New York, dismissing the amended bill of complaint upon the merits in an equity suit.

In both cases the Courts below sustained the constitutionality of the law in question as applied by the New York State Tax Commission to the plaintiff-in-error and the appellant respectively.

The Proceedings in Each Case.

Bass Case.

The Tax Commission assessed a corporation tax under said Article 9-A against Bass, Ratcliff & Gretton, Ltd., the plaintiff-in-error, a British corporation, of $826.14 for the tax year beginning November 1, 1918, based on the fiscal year ending June 30, 1918 (R., p. 28).

On rehearing this tax was affirmed. A writ of certiorari was sued out by the plaintiff-in-error to review such determination and heard on writ, petition and return in the New York Supreme Court, Appellate Division, Third Department, where the determination of the State Tax Commission, defendant-in-error, was affirmed without opinion (R., pp. 1-36). An appeal was taken to the Court of Appeals (R., p. 37), which affirmed the order of the Appellate Division (R., pp. 40-43, 62; reported in 232 N. Y. 42). Final judgment thereon was

entered in the Supreme Court (R., p. 45). On petition of the plaintiff-in-error (relator below) a writ of error was allowed (R., pp. 48-61).

Gorham Case.

The Gorham Manufacturing Company, a Rhode Island corporation, sued in equity to have the tax assessed against it for the year ending October 31, 1918, under said Article 9-A, amounting to $13,582.56, adjudged void and canceled of record, and to restrain the defendants from collecting such tax upon the ground that the tax was in contravention of the Federal Constitution (Complaint, R., pp. 1-5, as amended by Stipulation, R., pp. 21-22).

The defendants interposed separate answers and the case was tried and determined on the merits by the dismissal of the complaint as amended (Answers, R., pp. 5-10; Final Decree, R., pp. 48-49). An opinion was written by Judge Learned Hand (R., pp. 42-48; reported 274 Fed. 975).

A direct appeal was allowed to this Court, as the question involved was the constitutionality of said Article 9-A (R., pp. 49-55).

> *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50.
> *Davis* v. *Wallace,* 257 U. S. 478.

By reason of changes in office and in the Tax Law, this Court permitted the substitution of the State Tax Commission and the present Attorney General of New York as appellees herein (Reported 261 U. S. 1).

The Question Involved.

The question here involved is the constitutionality of Article 9-A of the Tax Law of the State of New York under the Fourteenth Amendment and the commerce clause of the Constitution.

This tax law imposes upon every domestic manufacturing and mercantile corporation, and upon every similar foreign corporation, "for the privilege of doing business in this State," an annual tax, to be computed "upon the basis of its net income for its fiscal or the calendar year next preceding, as hereinafter provided, upon which income such corporation is required to pay a tax to the United States," or, under the statute as amended retroactively April 18, 1918, "which income is presumably the same as the income upon which such corporation is required to pay a tax to the United States" (Sec. 209; printed *infra,* pp. 7 and 8).

If the corporation does business within and without the State, such net income is allocated in the proportion which the aggregate of the monthly averages of certain specified assets in the State bears to the aggregate of the monthly averages of such specified assets wherever located. In both instances, the assets are only a part of the total assets. These artificially selected assets are bills and accounts receivable, real property and tangible personal property, and the stock of other corporations (Sec. 214; printed *infra,* pp. 8 and 9).

Bass, Ratcliff & Gretton, Ltd., brews Bass' ale in England, and imported and sold a small percentage of the product in New York State during the year in question. During this year *"its net income from the New York business was nothing"* (Opinion of

Court below, R., p. 41). Nevertheless, because it had within the State a small portion of its assets yielding, however, no net income, it was taxed the sum of $826.14, being 3 per cent. upon the allocated amount of $27,537.68 of its total net income received during the year, and, therefore, upon "a portion of its net income earned wholly outside the State" (Opinion below, R., p. 42).

The Gorham Manufacturing Company has a large manufacturing plant in Providence, Rhode Island, where it manufactures silverware and kindred products. For the year in question, it also manufactured and sold munitions. All manufacture was in Rhode Island. Such manufacture and the sale of its products in all of the States of the Union and in some foreign countries was its entire business. It manufactured silverware and other metal products to the extent of 42 per cent. of its business, one-quarter of which were sold in New York, the only business done there. The remaining 58 per cent. of its business was the manufacture and sale of munitions, conducted wholly without the State of New York. Its actual income in New York during the year in question, derived entirely from the sale of silverware and kindred products manufactured in Rhode Island, was no more than $180,000, 8⅔ per cent. of its total net income, if all income from New York sales is presumed to be earned in New York and none credited to the process of manufacture by it in Rhode Island. If manufacture be credited with one-half, the net income actually earned in New York is reduced to $90,000. Nevertheless, for the year in question, $452,752, or 21⅔ per cent. of its total net income, was allocated to New York because that

percentage of the allocating items were situated in New York. This income, taxed at the rate of 3 per cent., resulted in the tax of $13,582.56 complained of. Such income taxed was two and one-half to five times as great as that actually earned in New York, where only 10½ per cent. of the total sales were made.

This gross inequality is due to the arbitrary provisions of the statute. The effort is made to ascertain New York's share of net income by allocating the *total net income everywhere* instead of that arising from sources within the State, and this on a basis which *conclusively* presumes a fixed net income to every dollar of ratio assets.

Real estate, tangible personal property and other factors in the allocating ratio, whether income producing or not, are presupposed to produce profit in exact proportion to their actual value. No attempt is made to include all income producing factors. On the contrary, cash sales and intangible property, together with other important factors, are ignored. Such allocation does not and cannot operate to separate the income earned in the State from that earned without. *No discretion as to the method of allocation is vested in the Tax Commission for the purpose of revision or otherwise.*

The consequence of the application of this inflexible formula to the cases at bar is a tax in an unreasonable amount, being many times the income earned by the taxpayer in New York. In the Bass case it actually and indisputably taxes a net income non-existent locally. The records here thus supply the proofs lacking in *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113.

1. Can a State constitutionally levy a tax computed on an allocated part of the total net income

of a foreign corporation, where the allocation, for no reason in law or economics, includes certain arbitrarily selected factors, and omits other factors equally important, none of the factors chosen being determinative of net income, when the result is to allot far more income thereby to New York than could have been earned therein; and thus employ income totally unrelated thereto to enlarge the measure of the tax?

2. Is not such tax upon the property or income, earned without the State, of a foreign corporation (engaged principally in the Gorham case in interstate commerce, and in the Bass case in foreign commerce), a direct burden upon such commerce, and, therefore, unconstitutional?

The assignments of errors which raise these questions are printed in the Appendix (*infra*, pp. 57-60).

The Statute.

The statute in question is a new form of corporate taxation for New York, enacted in 1917 and amended in 1918. It is Article 9-A of its Tax Law. The important parts relevant to the cases at bar are Sections 209 and 214. They are as follows:

Section 209. FRANCHISE TAX ON CORPORATIONS BASED ON NET INCOME. For the privilege of exercising its franchises in this state in a corporate or organized capacity every domestic manufacturing and every domestic mercantile corporation, and for the privilege of doing business in this state, every foreign manufacturing and every foreign mercan-

tile corporation, except corporations specified in the next section, shall annually pay in advance for the year beginning November first next preceding an annual franchise tax, to be computed by the tax commission upon the basis of its net income for its fiscal or the calendar year next preceding, as hereinafter provided, which income is presumably the same as the income upon which such corporation is required to pay a tax to the United States.

(Added by L. 1917, chap. 726; thus amended by L. 1918, chap. 276, in effect April 19, 1918.)

Section 214. COMPUTATION OF TAX. If the entire business of the corporation be transacted within the state, the tax imposed by this article shall be based upon the entire net income of such corporation as returned to the United States treasury department for such fiscal or calendar year.

If the entire business of such corporation be not transacted within the state, the tax imposed by this article shall be based upon a proportion of the net income, to be determined in accordance with the following rules:

The proportion of the net income of the corporation upon which the tax under this article shall be based, shall be such portion of the entire net income as the aggregate of

1. The average monthly value of the real property and tangible personal property within the state,

2. The average monthly value of bills and accounts receivable for (a) tangible personal property sold from its stores or stocks within the state, (b) tangible personal property manufactured or

shipped from within the state and (c) services performed within the state,

3. The proportion of the average value of the stocks of other corporations owned by the corporation, allocated to the state as provided by this section, bears to the aggregate of

4. The average monthly value of all the real property and tangible personal property of the corporation, wherever located.

5. The average total value of bills and accounts receivable for (a) tangible personal property sold from its stores or stocks within and without the state, (b) tangible personal property manufactured or shipped from within this and other states and countries, and (c) services performed both within and without this state,

6. The average total value of the stocks of other corporations owned by the corporation.

Real property and tangible personal property shall be taken at its actual value where located. The value of share stock of another corporation owned by a corporation liable hereunder shall for purposes of allocation of assets be apportioned in and out of the state in accordance with the value of the physical property in and out of the state representing such share stock.

(Added by L. 1917, chap. 726, in effect June 4, 1917.)

The Gorham case arises under the 1917 statute, before amendment, except that the amendment of 1918 to Section 209 is stated to be retroactive.

The Bass case arises under the statute as amended in 1918; the only difference between the original Act and as amended in 1918, in so far as pertinent here, being that in 1918 a limitation was placed upon the amount of stock of other corporations owned, so that in such allocations such stocks could only be included to an amount not exceeding 10 per cent. of the real and tangible personal property (Sec. 214, as amended in 1918; printed in Appendix, pp. 73-75). This provision was held unconstitutional by the Court of Appeals and presents a point in the Bass, but not in the Gorham case (*People ex rel. Alpha Portland Cement Co.* v. *Knapp*—Point V, *infra*, pp. 48-49).

The Facts.

The Bass Case.

The facts in the Bass case are not disputed, and are as stated in the opinion below (232 N. Y., at p. 45; R., p. 41), as follows:

> "Relator is a foreign manufacturing corporation organized under the laws of Great Britain and authorized to do business in the state of New York. For the privilege of doing business in this state it must annually pay in advance for the year beginning November first next preceding an annual franchise tax to be computed by the tax commission upon the basis of its net income for the year preceding. (Tax Law [Cons. Laws, ch. 60], §209.) Its business in New York was the importation and sale of Bass Ale manufactured at Burton-on-the-Trent. The question is as to the amount of the annual franchise tax for the year beginning November

1, 1918. It had in the year 1918 total segregated assets wherever located $3,212,405; actual value of shares of stocks of other corporations $845,195, a total of $4,057,600. Limiting the value of such shares to ten per centum of the aggregate real and tangible personal property (Tax Law, §214, subd. 6), the commission found total assets of $3,501,483; assets in New York $44,117. Its total net income for the year was $2,185,600. Its total sales in New York for the year amounted to about $240,000. *Its net income from the New York business was nothing.* The state tax commission under section 215 of the Tax Law providing for the computation of the tax by a comparison of total assets with assets in New York, allocated as taxable income to the state of New York the sum of $27,537.68, and computed a tax thereon at the rate of three per cent., amounting to $826.14. This tax was in lieu of all other taxes on personal property, capital stock or income (Tax Law, §219-j; §350, subd. 7)." (Italics ours.)

The fiscal year in question ended June 30, 1918. The business of the plaintiff-in-error was the brewing of Bass ale at Burton-on-the-Trent, England, and the sale thereof throughout the world. A very small part of its total product was imported and sold in the United States, of which 93 per cent. was sold in New York, 7 per cent. in Illinois. Two reports were made to the State Tax Department. The first expressly stated the net income for the fiscal year ending June 30, 1918, as reported to the United States Treasury Department, to be none (Exhibit A, R., p. 11). Only the segregated assets in the United States and New York were reported, totals respectively being $46,363.38 and $44,117.62

(Exhibit A, R., p. 12). The Tax Department called for an amended return showing the entire net income of the corporation on the ground that it was organized under the laws of a foreign country, and a segregation of its total assets (Exhibit B, R., pp. 13-14). Such amended report was filed (Exhibit C, R., pp. 14-17) under protest (Exhibit D, R., p. 17), and again showed the net income reported to the United States Treasury Department to be none, and reported a foreign net income of $2,185,600.

The Gorham Case.

The appellant is a Rhode Island corporation duly licensed to do business in New York (R., p. 11). Its offices, principal place of business and manufacturing plant are at Providence, Rhode Island, where all manufacturing is done. Its manufacturing plant consists of some thirty acres of land, with over forty buildings thereon, of substantial construction (R., pp. 22-23).

The entire business of the company consists of manufacturing various products at Providence, Rhode Island, and selling such products manufactured by it to merchants and other customers in all States of the United States and in some foreign countries (R., pp. 22-23).

It specializes in the manufacture of silverware and bronzes (R., p. 23). During the year in question, it also manufactured and sold munitions for war purposes, devoting two or three of its buildings solely to that purpose (R., p. 28). Its silverware business was carried on by manufacturing at Providence, Rhode Island, and selling at Providence, Rhode Island; New York City, New York; Chicago,

Illinois; San Francisco, California, and elsewhere (R., pp. 23, 29). It also has offices and show rooms in Chicago, Illinois, and San Francisco, California (R., p. 29).

The only business done in New York was the sale of silverware and kindred products; the munitions business was entirely extraneous to the state.

The appellant was assessed by New York a tax of $13,582.56 under said Article 9-A for the year beginning November 1, 1917, based on the income of its fiscal year ending January 31, 1917 (R., pp. 26-27).

Its tax return as amended showed, as required by the statute (Sec. 211, Appendix, pp. 62-63), a total everywhere of the average monthly value of bills and accounts receivable for personal property sold, of real and tangible personal property and stocks of other corporations of $14,565,748.41, and a total value of similar assets in New York of $2,505,116.71; also a net income, as reported to the United States for Federal income taxation, of $2,089,059.64 (R., pp. 12, 26; Exhibit 4, pp. 76-81).

The Tax Commission increased such aggregate value everywhere to $15,315,042, and the aggregate in New York to $3,319,154. *By the mandatory provisions of the statute* only the value of the items above specified were included in the returns and the Commission's revision thereof. None other (such as cash sales, cash on hand or in bank, patents or patent rights, good-will, and trade-marks and names) was taken into consideration, nor under the statute could be, either by the taxpayer or the Commission (R., pp. 26-27, 76-81).

From these figures the Commission compared the New York value with the total value of the items reported, the percentage being 21.67 per cent., and,

therefore, under the arbitrary mandate of the statute, allocated 21.67 per cent. of the total net income to New York, or $452,752. This, taxed at 3 per cent., produced the tax complained of (R., pp. 26-27). The statute did not permit the Commission to find the true amount of the net income earned in New York. In the record (p. 35), Mr. Merrill, Tax Commissioner, admits that "bills and accounts receivable have no relation whatever to sales." Further proof emphasizes this (Q. 52. "That is, the figures required to be returned on the State tax were not such as can produce the proportion of income earned within the State?" A. "No; they are not"—testimony of Mr. Downs, appellant's supervising accountant, R., p. 19.)

The only business done in New York was the sale of silverware and kindred products—all manufactured in Rhode Island, hence the only net income earned there is limited to that derived from such local business. During the fiscal year in question its total sales of silverware and kindred products everywhere were $5,029,158.47—its total net income therefrom everywhere $723,084.55—a rate of return of 14.38 per cent. (R., pp. 23-24). *On its said sales or business done in New York the appellant did not realize any substantially greater average net profit than it realized on sales of its merchandise, other than munitions, outside of New York* (R., pp. 23, 24). Its sales in New York of said silverware and kindred products were $1,244,396.83; its net income therefrom therefore could not exceed about $189,000 (New York sales $1,244,396.83 × 14.38 per cent. average profit), or only 8⅔ per cent. of its entire net profits, and not 21⅔ per cent., as allocated by the Tax Commission.

During the year in question the taxpayer's total business everywhere was $11,913,704.27. Of this, $6,884,545.80, or 58 per cent., consisted of the manufacture and sale of munitions, wholly at Providence, Rhode Island. The balance, $5,029,158.47 or 42 per cent., was the manufacture and sale of silverware and kindred products. Of the latter, New York sales amounted to $1,244,396.83, being 10½ per cent. of the total sales of all products and one-quarter of all the sales of silverware and kindred products. Of the balance, $3,402,540.02 was sold outside New York; and $382,221.62 ($434,342.74 less 12 per cent.) was sold at Providence and shipped to New York for delivery on prior orders. So of its total sales of all products, $10,669,307.44, were sales outside of New York State (R., pp. 23, 24, 26, 37).

The net income from munitions was $1,365,975.09 (65½ per cent. of the total net income) at a rate of profit of 19.55 per cent. as against the rate of 14.38 on silverware.

The net profit on silverware and kindred products everywere was $723,084.55, of which one-quarter (sales in New York) is $180,770. This is less than 8⅔ per cent. of the total net income of $2,089,059.64, *while the tax is upon 21.67 per cent. or $452,752 of the total net income.*

But even that figure of $180,770 of net income from New York sales is far above net earnings in New York, for it results from the sale of its own products, all of which are manufactured at its factory in Providence, Rhode Island.

As was recognized in the *Underwood* case (*infra*, pp. 26-27), the process of manufacture is a very important contribution to the net profits resulting from the manufacture and sale of goods. It would

not seem an unfair apportionment to say that one-half of such net profits resulted from the extra-state manufacture. (It was admitted on the trial by Mr. Merrill, Tax Commissioner, that "a part of the profits are realized in both States," R., p. 23).

We thus have to deal here with a range of local net income of $4\frac{1}{3}$ per cent. or $90,385 to $8\frac{2}{3}$ per cent. or $180,770, the latter the maximum of all the net income to be attributed to the sale of the goods in New York *and their manufacture in Rhode Island,* as opposed *to a tax upon $21\frac{2}{3}$ per cent. or $452,752 of the net income wherever earned.*

While gross sales are not necessarily a safe guide in allocating net profits, the record here discloses that gross sales determine the limits of the New York net profits; for no greater profit was realized on the goods in New York than on similar goods sold elsewhere.

In view of the arbitrary stress laid in the allocation upon the situs of accounts and bills receivable and the ignoring therein of cash sales, the following facts are of special importance:

The entire business done by the appellant in New York consisted of sales of silverware and kindred products manufactured in Rhode Island, all of which resulted in accounts receivable (R., pp. 35, 37, 39). The munitions, all made and sold outside New York, were paid for in cash on delivery, or sometimes in advance, and there were no bills and accounts receivable arising from this cash business (R., p. 32).

The sales in New York were according to the following method: Goods were shipped from the factory at Providence to its selling agent, The Gorham Company, a different entity, which held them in stock, as consignee (R., pp. 34-

35, 39). When these goods were sold to the customers of this agent, the plaintiff took them out of consignment account and charged them to it, giving rise to an account receivable from such agent (R., p. 35). Only orders received by the agent for goods not in stock ($382,221.62) were forwarded to Providence, where they were accepted and filled by the appellant, and the goods sent to the agent at New York, marked for the customer (R., p. 40).

POINT I.

The tax imposed by Article 9-A of the New York Tax Law upon these foreign corporations is unconstitutional as in effect taxing their income and property without the State.

> *Wallace* v. *Hines,* 253 U. S. 66.
> *Union Tank Line Co.* v. *Wright,* 249 U. S. 275.
> *Meyer, Auditor of Oklahoma* v. *Wells Fargo & Co.,* 223 U. S. 298.
> *Fargo* v. *Hart,* 193 U. S. 490.
> *People ex rel. Alpha Portland Cement Co.* v. *Knapp,* 230 N. Y. 48. See also memo. on denial of motion for reargument, 231 N. Y. 516. Petition to United States Supreme Court for writ of certiorari denied June 6, 1921, 256 U. S. 702.
> *International Paper Co.* v. *Massachusetts,* 246 U. S. 135.
> *Looney* v. *Crane Co.,* 245 U. S. 178.
> *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1.
> *Galveston H. & S. A. R. Co.* v. *Texas,* 210 U. S. 217.
> *Delaware, L. & W. R. R. Co.* v. *Pennsylvania,* 198 U. S. 341.

The tax is entitled a "Franchise Tax." The immateriality of the title of such a tax is settled. In *Underwood Typewriter Company* v. *Chamberlain,* 254 U. S. 113, the Court in dismissing this point said, at page 120:

"It is contended that the tax violates the Fourteenth Amendment because directly or indirectly it is imposed on income arising from business conducted beyond the boundaries of the State. In considering this objection we may lay on one side the question whether this is an excise tax purporting to be measured by the income accruing from business within the State or a direct tax upon that income, for 'the argument upon analysis resolves itself into a mere question of definitions and has no legitimate bearing upon any question arising under the Federal Constitution.' *Shaffer* v. *Carter,* 252 U. S. 37."

The facts *supra* show that in the Bass case net income earned wholly in foreign countries was used as the measure of the tax, while in the Gorham case income from two and one-half to five times the amount earned in New York was taxed; this range depending on whether earnings should be attributed in part to the place of manufacture.

If one-half the net income from manufacture and sale be attributed to the place of manufacture (*supra,* p. 16), in the Gorham case the allocation to New York of \$452,752 of net income on the selling end alone of a business of \$1,244,396.83 becomes grotesque. To justify it the total profits on the goods sold in New York must have been twice \$452,752, or \$905,504, a profit ratio of over 72½ per cent., as contrasted with 14.38 per cent., the actual margin of profit on this business, as shown by the record. Furthermore, the total net income from the entire silverware and kindred business, everywhere, was only \$723,084.55.

The actual profit on the goods sold in New York was about $180,000. If one-half thereof be allocated to Rhode Island, *the income actually earned in New York was about $90,000, or $360,000 less than the amount allocated under this statute.*

If a taxing measure purports to value the privilege of doing business within the State, it cannot arbitrarily inflate that value by operations which take place beyond its borders; neither can the taxing power increase the value of property which it taxes by attaching thereto some unrelated factor.

A State may not tax the property employed nor the business done without the State. Neither may it tax the profits therefrom as such nor by taking them as a measure for the tax. This Court has said in effect that the State may tax the tree or the fruit of the tree (*Shaffer* v. *Carter,* 252 U. S. 37, 50, 51). If the tree is situated outside the State, it cannot be taxed by the State. Something more than a legislative fiat is then necessary to bring the fruit within.

This statute is inherently arbitrary, and therefore invalid, because it wholly, or at least in a substantial degree, disregards realities and is thus intrinsically unworkable as a formula for allocating income, as the tax measure, with a fair degree of accuracy. Where income is the measure, the formula must be tested on the basis of the substantial (not necessarily mathematical) correctness with which it divides income into state earned and extra-state earned (see Point II, *infra,* pp. 28-39).

A statute purporting to allocate income to the State must show a real design to accomplish that result. If it prescribes a rigid formula, leaving

no discretion in the taxing authorities to correct inequalities, its validity depends upon the relation of the factors prescribed therein to this essential aim. If no such relation exists, the method is arbitrary. "Taxes must follow realities, not mere deductions from inadequate or irrelevant data" (*Union Tank Line Co.* v. *Wright*, 249 U. S. 275, at p. 286).

This reasoning is in truth the fundamental basis of the unit rule which, however, has been expressly limited to common carriers (*Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194; 166 U. S. 185), but even within its limits the unit rule has never sanctioned an arbitrary or artificial basis for computation (*Fargo* v. *Hart, supra; Meyer etc.* v. *Wells, Fargo & Co., supra; Union Tank Line Co.* v. *Wright, supra; Wallace* v. *Hines, supra*).

To quote from *Wallace* v. *Hines, supra*, page 69:

> "The only reason for allowing a state to look beyond its borders when it taxes property of foreign corporations is that it may get the true value of things within it when they are part of an organic system of wide extent, that gives them a value above that which they otherwise would possess. *The purpose is not to expose the heel of the system to a mortal dart—not, in other words, to open to taxation what is not within the state.* Therefore, no property of such an interstate road situated elsewhere can be taken into account *unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the state.*"

Such cases establish the invalidity of the statute in question as taxing net income of foreign corpo-

rations without the State. In those cases, as here, the taxpayer was a foreign corporation doing business in and out of the State and the amount of property taxable was determined by a proportion of the selected local assets to their total everywhere. In *Fargo* v. *Hart, supra,* the property taxed was the market value of the stock; in *Wallace* v. *Hines,* the right to do business locally, measured by the value of stocks and bonds. In both cases, such value was proportioned to the State according to the ratio of mileage in to everywhere. In the *Meyer* case, the property taxed was that part of the total gross receipts equal to the proportion of local business to total business. In *Union Tank Line Co.* v. *Wright,* the property taxed was that part of the total value of property everywhere equal to the proportion that the miles of railroad in the State over which the tank cars moved bore to the total of like mileage everywhere.

The tax was held void by this Court in all of these cases because its basis or measure included extra-state property. This fact rendered all other considerations immaterial. The inquiry was held objective and not subjective and the formula, means or method by which the tax was arrived at unavailing to save the statute and tax. Thus, in *Union Tank Line Co.* v. *Wright, supra* (italics ours), page 282:

> "A State may not tax property belonging to a foreign corporation which has never come within its borders—to do so *under any formula* would violate the due process clause of the Fourteenth Amendment,"

and page 286:

> "*Under no formula* can a State tax things wholly beyond its jurisdiction."

In *People ex rel. Alpha Portland Cement Co.* v. *Knapp, supra,* the Court of Appeals held two features of this law unconstitutional. It was held that Article 9-A, here in question, imposing a tax upon foreign corporations for the privilege of doing business in New York, is unconstitutional in so far as it directs that the income of bonds and stocks shall be included in the allocated income on which the tax is computed but the principal thereof disregarded in the allocation of assets.

The Court, however, thought *on the record before it* that these unconstitutional features could be severed from the other portions of the law, so that the order of the Appellate Division setting aside the whole tax as unconstitutional was reversed and the proceeding remitted for the revision of the assessment accordingly. This decision, limited to holding a part of the law unconstitutional, was by a divided court, Hiscock, *Ch. J.*, and Collin, *J.*, dissenting and voting for affirmance on the ground that the statute is unconstitutional.

Thus two Judges of the Court of Appeals and three Justices of the Appellate Division thought that this statute was wholly unconstitutional as taxing property of a foreign corporation outside the State. Four Judges of the Court of Appeals thought the two features particularly complained of were unconstitutional but separable; and one Judge of the Court of Appeals and the two dissenting Justices below thought the statute constitutional. The opinions below are reported in 191 App. Div. 262.

The record in the *Alpha* case, however, confined as it was to the contentions relating to bond interest and dividends, did not present the many other particulars in which the allocation of income is inherently arbitrary under the mandatory segregation of assets of the statute.

In that case severance was resorted to, to save the statute, because it seemed possible to lop off the only two diseased limbs to which the attention of the Court was directed. Even though such an operation was deemed possible on the proofs in the *Alpha* case, it can have no general application. The arbitrariness and unreasonable result of the statute are here beyond cure, for in its present application these relate to the whole trunk of the allocating ratio and not to separate limbs.

In Judge Cardozo's opinion in the Court of Appeals in the *Alpha* case, he states at page 52:

> "No assets not included in the enumerated classes are to enter into the ratio. The scheme of allocation takes no heed of investments in bonds and like intangible assets (Secs. 208, 214)."

Again, at pages 55-56:

> "I think the statute is invalid in its application to the relator, in so far as it lays upon income a burden that is irrespective of the situs of the assets by which income is produced. * * * The state may not say that the right to conduct the local business shall be lost if the corporation will not pay a tax upon property which, by reason of its situs elsewhere, is immune from taxation here. * * * In determining whether the tax is in truth a tax on property, we are to con-

sider, not its form or label, but its practical operation."

Again, at page 57:

> "A burden, arbitrarily swollen by resort to foreign assets, is not saved by the label which identifies it as a tax upon a local privilege.
>
> Tested by these precedents, the tax imposed upon this franchise must be held in practical operation to be a tax upon the income."

Again, at pages 58-59:

> "Here, as there, the statute prescribes a rule of allocation which, as applied to foreign corporations holding bonds and shares in other states, involves an artificial and arbitrary augmentation of the value of the local privilege. It measures the value of the franchise, here and elsewhere, *by income from all sources, and excludes some of the same sources when the value is apportioned.* To take from assets elsewhere is equivalent to adding to assets here. The statute would be little different in principle if it announced the arbitrary rule that all investments in bonds and stocks should be conclusively presumed to have their situs in New York. The resulting vice in the proportion is not the consequence of adventitious circumstances, of inequalities developing unexpectedly in the practical workings of the statute, but hardly to be avoided by reasonable foresight. The exclusion of bonds and stocks is the result of an explicit mandate. The principle of allocation is not followed to its natural and obvious outcome in accordance with the situs of the assets, but is consciously checked, its normal course is thwarted, by an artificial and designed

> exception. Something which, in the absence of express exclusion, would be within its operation, is knowingly taken out of it. *I am unable to avoid the conclusion that a method of apportionment which purposely ignores realities, which compels an assessor to look to some of the assets only, and close his eyes to all the others, is arbitrary and unreasonable in its increase of the local burden.*" (Italics ours.)

Excluding the severance feature, which cannot be applied here, this reasoning in the *Alpha* case is especially in point. The inclusion there of interest and dividends was condemned because the sources thereof were not considered in the allocating ratio. Here other more important income-producing factors are excluded, while the income therefrom is allocated. This affects the entire allocating ratio and thus condemns the entire statute.

In *Underwood Typewriter Co.* v. *Chamberlain, supra*, the excise on the right to do local business was measured by that part of the total net income equal to the proportion of the value of the local tangible personalty and realty to their total everywhere, and there was applied the rule of *Adams Express Co.* v. *Ohio State Auditor,* 166 U. S. 185, 222, that the taxpayer has the *onus* of showing that extra State property was taxed and thus that income was allocated to the State in excess of that actually earned there. This Court held (p. 121) that the plaintiff failed to sustain

> "the burden of showing that 47 per cent. of its net income is not reasonably attributable, for purposes of taxation, to the manufac-

> ture" (in the taxing State) "of products from the sale of which 80 per cent. of its gross earnings was derived after paying manufacturing costs. * * *. There is, consequently, nothing in this record to show that the method of apportionment adopted by the State was inherently arbitrary, or that its application to this corporation produced an unreasonable result.
>
> We have no occasion to consider whether the rule prescribed, if applied under different conditions, might be obnoxious to the Constitution."

The case was decided upon the failure of the taxpayer to prove what is conceded in the Bass case and demonstrated in the Gorham case—the measuring of the tax by income foreign to the State, there being, respectively, no local income or but a small part of that taxed.

See, also, cases cited at beginning of this Point.

The consequences of legalizing taxes such as the present appear in *Western Union* v. *Kansas,* 216 U. S. 1, at page 37:

> "It is easy to be seen that if every state should pass a statute similar to that enacted by Kansas, not only the freedom of interstate commerce would be destroyed, the decisions of this court nullified, and the business of the country thrown into confusion, but each state would continue to meet its own local expenses not only by exactions that directly burden such commerce but by taxation upon property situated beyond its limits."

The same thought is expressed in *Postal Tel. Cable Co.* v. *Taylor,* 192 U. S. 69, 72, where in de-

claring an ordinance, imposing an excessive license fee on the poles and wires of an interstate telegraph company, invalid—even if an exercise of police power—the Court said that it would result "in a rate of taxation which, if carried out throughout the country, would bankrupt the company were it added to the other taxes properly assessed for revenue and paid by the company."

POINT II.

The method of apportionment prescribed by Section 214 of Article 9-A of the New York Tax Law is inherently arbitrary.

Union Tank Line Co. v. *Wright, supra* (p. 283), supplies the test for inherent arbitrariness, as follows:

> "In the present case the comptroller general made no effort to assess according to real value or otherwise than upon the ratio which miles of railroad in Georgia over which the cars moved bore to total mileage so traversed in all states. Real values—the essential aim—of property within a state cannot be ascertained with even approximate accuracy by such process; the rule adopted has no necessary relation thereto. During a year two or three cars might pass over every mile of railroad in one state while hundreds constantly employed in another moved over lines of less total length. Fifty-seven was the average number of cars within Georgia during 1913 and each had a 'true' value of $830. Thus the total there subject to taxation amounted to $47,310—

the challenged assessment specified $291,196.
We think plaintiff-in-error's property was appraised according to an arbitrary method, which produced results wholly unreasonable, and that to permit enforcement of the proposed tax would deprive it of property without due process of law and also unduly burden interstate commerce."

The real value of income produced in New York cannot be ascertained with approximate accuracy by the statute in question and the statute is therefore inherently arbitrary for the following reasons:

1. It attempts an allocation of the *entire net income,* rather than that local or partially within and without, and as such includes that which is foreign. (In the Bass case only foreign income is allocated.)

> "The only reason for allowing a state to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it *when they are part of an organic system of wide extent that gives them a value above what they otherwise would possess"* (*Wallace* v. *Hines, supra,* p. 69). (Italics ours.)

Neither the allocating assets nor the income are part of such a system. Being a manufacturing corporation, the presence of a plant in one jurisdiction and a store in another does not make it "an organic system of wide extent" (*Adams* v. *Ohio State Auditor,* 165 U. S., at p. 222; also dissenting opinion of Mr. Justice White, pp. 229-254; *Fargo* v. *Hart, supra; Meyer, Auditor of Oklahoma,* v. *Wells, Fargo & Co., supra; Union Tank Line Co.* v. *Wright, supra*). The so-called unit rule has never

been applied where no part of the basic measure was in the State as in the Bass case.

Contrast with this State method of allocation, the Federal treatment of *exactly the same problem of ascertaining the net income derived from the sale of personal property produced in whole or in part by the taxpayer without and sold within its jurisdiction.* The Federal Government limits allocation to the income from such sources and does not allocate *the entire net income* of the corporation (see also *Atlantic Coast Line* v. *Daughton,* 262 U. S. 413). And allocation is only resorted to if, by accounting, the *actual* local net income cannot be ascertained (Rev. Act 1921, Secs. 217, 234; Regulations, Arts. 325, 328 and 573).

In the determination of the same question in the Bass case, the practical difference is that the Federal Government, by confining its allocation to the net income from the operations partially local, would not and did not tax the corporation, whereas the State, by its allocation of the entire net income, did tax it.

2. It allocates income from all sources but in proportioning ratio assets arbitrarily excludes many sources from the assets by which such income is allocated.

Net income is allocated in the proportion that local realty, tangible personalty, stocks and accounts and bills receivable from sales of tangible personalty and services, expressed in average monthly values, bear to the total of the like everywhere. In short, a comparison is made between the situs, local and foreign, of four classes of assets, two of which are usually regarded as capital (real

estate and stocks); one of which may be capital or turnover assets (tangible personalty), and the remaining one is a part of gross income (accounts and bills receivable) being either a proceed of a sale of tangible personalty or from services. "No assets not included in the enumerated classes are to enter into the ratio" (*Alpha* case, *supra,* 230 N. Y. p. 52).

Gross sales or gross receipts play no part in the ratio except as bills and accounts receivable appear. Cash sales are wholly disregarded. Sixty-five and a half per cent. of the Gorham's income was from cash sales, all extra-state.

Intangible sources of income (save stocks) are excluded from the allocating ratio. The income therefrom is allocated in accordance with the situs of other assets bearing no necessary relation thereto. Thus interest on a California bank account of a Rhode Island corporation may, in part at least, be brought into New York as a tax measure. The same treatment is accorded extra-state cash transactions which do not involve the ownership of any of the selected assets.

Income earned and received without the State of New York resulting from operations not involving the ownership of an asset of the selected classes is made to pay tribute to the State to the extent of the allocated percentage. An illustration would be cash commissions received without the State for the sale by it of the merchandise of another corporation.

A corporation manufacturing outside of New York largely increases the taxation on its income earned on the same business done in New York by leasing rather than owning its factory. Again, if

the cash business conducted wholly outside the State increases in profits and all other factors remain constant, the taxable income allocated to New York automatically increases although the New York business and actual income remains the same. In the last two examples, totally unrelated transactions, by the statute, have gone to swell New York's tax measure.

Goods sold for cash appear in the ratio as tangible personal property, but upon their sale drop out of the allocation. If credit be given, however, they appear again as bills or accounts receivable, and thus play a dual role in swelling the aggregate, though but one profit on such sale can result.

This allocation of income by sources other than those producing it, varies from the Federal method of handling the same problem. There, where allocation is resorted to, one-half the net income is allocated in accordance with the situs of property in and out, "held or used to produce income which is derived from sources partly within and partly without the United States," the other half in accordance with the gross sales in and out.

And this feature so far as it affected the allocation of interest from bonds where the bonds were omitted from the allocation has been held by the Court of Appeals to render the allocation *pro tanto* invalid as inherently arbitrary, in the *Alpha* case, *supra,* where the effect of the allocation of the statute in excluding bonds is said by Judge Cardozo (230 N. Y. 48, 58) to be:

> "It measures the value of the franchise, here and elsewhere, by income from all sources, and excludes some of the same sources when the value is apportioned. To

take from assets elsewhere is equivalent to adding to assets here. The statute would be little different in principle if it announced the arbitrary rule that all investments in bonds and stocks should be conclusively presumed to have their situs in New York."

3. The purely arbitrary and unreasonable formula is based upon the inaccurate presumption that every dollar of ratio assets everywhere has the same yield of net income. As applied in the Bass case, it works out that every dollar of ratio assets everywhere is conclusively presumed to earn net income everywhere of 62 cents plus; this computation being, of course, based on the monthly averages of the ratio assets. This presumption is manifestly abnormal and dependent upon the fortuitous. It involves the obvious solecism, that per dollar of ratio assets, each element that goes to make up *net income,* to wit, gross income and deductions, is in the same proportion everywhere. That wherever you have the same ratio assets you will have the same income. The actual economic, political and other factors that govern this are disregarded.

Thus, real estate and tangible personal property, no matter how or where employed, whether income producing or not, are presumed to produce "statutory" income in direct proportion to their market value. Likewise with stocks.

Unproductive real estate and tangible personal property within the State become income producing under this statute, for they serve to bring into the State, for the purpose of taxation, income which actually is not there.

The relative rate of income from any income-producing assets of the selected classes becomes immaterial because all such assets are assumed to produce the same ratio of income as their intrinsic worth. This results in assets of small intrinsic value out of New York but yielding a large return of income being used to measure, and thus appropriate to the State tax, income earned and received without the State, the product of assets yielding such larger net returns.

Real or personal property yielding a large income and situated without the State is weighed in this allocation against like property situated within the State yet yielding no income whatever as is here shown in the Bass case. The effect can only be to tax income from such foreign assets earned and received without the State.

Bills and accounts receivable are to be used in the allocation at their face amount regardless of whether the transaction results in a profit, and thus yields net income, or a loss. Sales of merchandise may all be made at a loss in the year in question owing to the necessity of liquidating stocks in adverse market conditions. Yet the corporation may receive a large net income from other extra-state sources. That income is made tributary to New York in proportion to unproductive transactions not entering into the result. The larger the loss from sales in New York the greater the tax upon the other income, for the net thus earned must first bear the loss in New York before the tax is computed on the remaining net income. That is the situation in the Bass case. Such receivables are not a measure of anything except the *credit* which must perforce be given. Mr. Merrill, Tax

Commissioner, admitted on the trial in the Gorham case that "bills and accounts receivable have no relation whatever to sales" (R., p. 35).

The "proof of the pudding is in the eating" and the practical results here confirm the falsity of the presumption. In the Gorham case the artificial allocation exceeded reality from two and one-half to five times. In both cases, the foreign business was more profitable than the local, and such circumstances cannot be said to be unusual. One branch may lose while another makes, or one may make more than another, and this entirely irrespective of the character of assets. Under no stretch of the imagination can it be said to be the common experience that all branches or all corporations earn at the same rate, either per assets employed or per accounts and bills receivable or per a combination of both. The facts disclosed in the proofs here threw the entire allocating mechanism out of gear. What, therefore, can be said in favor of a machine that fails at the ordinary and succeeds only with the miraculous?

4. Allocation is on the basis of the "average monthly values" of the ratio assets. These are arrived at by ascertaining the value in each month, adding the twelve valuations, and dividing the result.

The "average monthly value" feature, particularly of bills and accounts receivable, is unrelated to the verities. For, under the statute, the longer a receivable remains uncollected, the greater is its income-producing importance (since it will go to swell each monthly total) until paid.

Under this formula, goods sold on credit give rise to two items in the scheme of apportion-

ment, their value before the sale and the bills and accounts receivable as a result of the sale. Goods sold for cash play a part just half as important, for their value before sale constitutes their sole role in the plan of allocation. Yet what merchant or manufacturer will not agree that a cash sale is preferable to one on credit, as a matter of net income? Furthermore, the length of the term of credit is, in reality, in reverse ratio to the profit of the transaction, since with companies like the parties here no interest is borne and the creditor is deprived of the use of its money for the time; but under the New York statute, the longer the taxpayer must keep the credit on its books, the greater part it plays in determining its tax. For it is the monthly average that counts, hence uncollectible credits appear month after month to increase the monthly average. The cash sales, on the other hand, made outside the State of New York, have the effect of increasing the amount of income allocated to New York by this taxing statute, for it removes an item, the property sold, which would otherwise add to the denominator of New York's statutory fraction and nothing results to take its place—quite contrary to the result of a sale on credit. This arbitrary disproportion is especially pertinent here, as the Gorham's munitions business, 65½ per cent. of its net income, was carried on entirely at Providence, was done on a cash basis and was wholly unrelated to New York.

Thus New York's treatment of sales, the foundation of income, in its allocating formula, ignores that which plays the largest part in the actual realization of income, viz., payments received, and magnifies that sworn enemy of actual profits, viz., frozen credits. If this is "reality," the Legislature

of New York has indeed revolutionized economics. Such legislative legerdemain may sound well in theory, but its application to a great commercial metropolis like New York City can only result in gross injustice.

Similarly "turnovers" in merchandise are given no weight under the "average monthly value" scheme which credits to goods, stale on the shelf, the same income producing effect as those which are sold a month after their manufacture; for the former, if held throughout the fiscal year, contribute to each monthly total, but produce no income, while similar goods promptly sold contribute no greater sum to the aggregate of the monthly totals, but yield numerous profits.

Bills and accounts receivable for goods sold in or shipped from New York State are taken at their face amount in the monthly average of bills and accounts receivable in the allocation, irrespective of whether the goods were manufactured within or without the State. From a sale of the former kind both manufacturing and selling profit within the State results, while in that of the latter class, the selling profit alone is income earned within the State.

The vagaries within the same kind of asset are as great as between different kinds. Bills and accounts receivable are given their value in each successive month, going to make up the monthly average for the year. Yet but one profit results and that from their payment. Thirty-day accounts are modestly charged in effect with but a single profit, but slow accounts are magnified in the allocation by attributing to them two, three, four or perchance twelve separate and distinct "profits," according to the number of months they reappear

unpaid upon the books of the corporation. By such legerdemain even the German mark might be stabilized.

5. The further indicia of arbitrariness in the formula is its failure to recognize an unreasonable result. It is immutable—unchangeable—and, notwithstanding an extra-state taking, it, and only it, can determine the tax (see Point IV, *infra*, pp. 41-48). Granting an unreasonable result, an extra-state taking—this cannot be corrected by the local forums (compare opinions, Andrews, J., and Cardozo, J., in *Alpha* case, *supra*, discussed *infra*, p. 46).

The conclusion to be drawn from a study of the scheme of allocation of this law is that it bears no relation to the net income received or earned either within or without the State, as the factors chosen are not determinative of the yield of any net income, its aggregate amount or the rate of return. Any approximation to the actual is accidental. The apportionment resulting is *not* income earned or received in the State of New York.

It may be asked what purpose such an illogical allocation serves. The answer is in the amount of taxes collected. All of the net income is subjected to the allocated percentage, from whatever source derived. Thus nothing may escape. All real estate and tangible personal property in the State enters into the measure and to these are added, largely by way of duplication, lest perchance something escape, all bills and accounts receivable of the classes specified, covering merchandise sold from its stores or stocks within the

State, manufactured or shipped from within the State, and for services performed within the State. Thus is secured an allocated part of foreign net income, notwithstanding it is earned and received without the State. This ingenious scheme may afford a temporary relief to the State Treasury, but such burdens on commercial intercourse with other states and nations can only injure in the long run the welfare of New York. Be this as it may, the vice lies in its injustice. It is the policy of Ishmael, its hand against the rest of the world.

POINT III.

A tax upon the property of a foreign corporation, engaged principally in interstate or foreign commerce, on its property without the State, is a direct burden on such commerce and is therefore unconstitutional.

Meyer, Auditor of Oklahoma, v. *Wells Fargo & Co.,* 223 U. S., 298.
Bowman v. *Continental Oil Co.,* 256 U. S., 642.
Dahnke-Walker Milling Co. v. *Bondurant,* 257 U. S., 282.
Eureka Pipe Line Co. v. *Hallanan,* 257 U. S., 265.
Champlain Realty Co. v. *Brattleboro,* 260 U. S., 366.
Phipps v. *Cleveland Refining Co.,* 261 U. S. 449.
Western Union Telegraph Co. v. *Kansas,* 216 U. S., 1.

Looney v. *Crane Co.*, 245 U. S., 178.
International Paper Co. v. *Massachusetts*, 246 U. S., 135.

In the Bass case the business of the plaintiff-in-error consisted of brewing Bass' ale in England, the greater bulk of which was sold throughout the World, and only a comparatively small part of which was sold in New York. It was thus engaged in foreign commerce.

In the Gorham case the entire business of the appellant consisted of manufacturing various products at Providence, Rhode Island, and selling such products manufactured by it to merchants and other customers in all states of the United States and some foreign countries. It was thus chiefly engaged in interstate commerce (R., pp. 22, 23).

When goods are purchased in one state for transportation to another, the purchase is interstate commerce quite as much as the transportation.

Dahnke-Walker Milling Co. v. *Bondurant*, *supra*.

To tax the net income earned wholly without the State in interstate or foreign commerce is to place a direct burden upon such commerce; for the State of New York appropriates to itself a substantial part of the net earnings therefrom. The burden is too clear to require any amplification of this point.

POINT IV.

The equity suit in the Gorham case is properly brought, as the Tax Commission had no power to remedy matters therein complained of.

Atlantic Coast Line R. Co. v. *Daughton,* 262 U. S. 413.

Wallace v. *Hines,* 253 U. S. 66.

Dawson v. *Kentucky Distilleries & Warehouse Co.,* 255 U. S. 288.

Eureka Pipe Line Co. v. *Hallanan,* 257 U. S., 265.

Turner v. *Wade,* 254 U. S. 64.

This point has no application to the Bass case, for resort was had there to the State Tax Commission and to the local courts and both proved unavailing.

The Gorham Manufacturing Company has no adequate remedy in the review of the Tax Commission's determination by *certiorari.* It is the owner of a leasehold upon which the tax in question is made a lien by the statute and is thus a cloud on the title thereto. The statute provides for drastic remedies for non-payment of the tax, together with heavy penalties for delay in payment. Execution may be levied on all the property of the plaintiff and an action brought by the Attorney General to forfeit the plaintiff's charter and to recover the tax (Complaint, "Sixth," admitted by answers, "Third," R., pp. 4, 5 and 8; Tax Law, Sections 219c, 219e, 219, 199 and 200; all printed in Appendix).

No proceedings to review the tax by *certiorari* can be commenced unless the amount of the tax is deposited and a bond furnished to secure costs (Sec. 219).

Even were the plaintiff successful and the tax held illegal, there is no provision in the Tax Law or elsewhere for refunding the "deposit," and the only reported case on the subject in the State Courts held that the Tax Commission cannot, without legislation, return to a corporation the deposit of an assessment made by it, though same be subsequently declared illegal, as Section 21, Article III, of the State Constitution, forbids it. *Matter of Waterman Co.,* 33 Misc. Rep. (N. Y.) 569.

Thus, the plaintiff's remedy by *certiorari* to the State Courts was not only inadequate, but, as a *practical matter, non-existent.*

In *Dawson* v. *Kentucky Distilleries and Warehouse Co., supra,* it was held that the Federal Courts could not decline jurisdiction of a suit to enjoin the collection of a Kentucky tax which is asserted to be illegal, where, whatever remedies to recover back illegal taxes paid under protest Ky. Stat. Section 162 is now regarded as conferring, the decisions of the highest court left it at least doubtful, when the suit was brought, whether money so paid could be recovered at law by the taxpayer. "It is well settled," said Mr. Justice Brandeis, in the opinion of the Court, at page 296, "that 'if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit.' *Davis* v. *Wakelee,* 156 U. S. 680, 688."

Atlantic Coast Line R. Co. v. *Daughton, supra,* decided that this Court could not say that the remedy at law for the recovery of a tax illegally

paid is plain and adequate, so as to prevent maintenance of a bill to enjoin its enforcement, when the remedy depends for its enforcement on a statute which has not been construed and applied by the highest court of the State.

On this point the Court below found in the Gorham case in favor of the plaintiff on the ground that the statute in question compels the taxpayer, before availing himself of any other remedy, to deposit the amount of the tax with the State Comptroller, and there is no provision for getting it back in case the taxpayer succeeds and the tax is cancelled or reduced, citing *In re Waterman, supra,* as "flatly against any recovery."

Judge Learned Hand, in the opinion below, held that "an adequate remedy at law" (by certiorari) "is not clear enough" to prevent equity assuming jurisdiction (274 Fed. 977; R., p. 43). But he denied relief from a tax which he thought improper because the plaintiff had not applied for a rehearing before the Tax Commission, under Section 218, presented to that body the details of its business, as set forth in the record of this case, and demanded a revision, saying:

> "While, therefore, on the facts as stated, the tax both in respect of this and of the munitions business was erroneous, the plaintiff did not choose to avail itself of that process of law which was accorded to it, and therefore was not the victim of any unconstitutional action by the Commission" (274 Fed. 981, R., p. 47).

Thus, while decreeing that in allocating income to New York, the munitions business should have

been separated from the silverware business, he thought that the plaintiff should have sought relief in a review on rehearing before the State Tax Commission.

The provisions of the Tax Law relied on in reaching this conclusion (see opinion, pp. 979-980; R., p. 46) are as follows:

> "Sec. 218. ***Revision and readjustment of accounts by tax commission.*** If an application for revision be filed with the commission by a corporation against which an account is audited and stated within one year from the time any such account shall have been audited and stated, the commission shall grant a hearing thereon and if it shall be made to appear upon any such hearing by evidence submitted to it or otherwise, that any such account included taxes or other charges *which could not have been lawfully demanded, or that payment has been illegally made or exacted of any such account,* the commission shall resettle the same according to law and the facts, and adjust the account for taxes accordingly, and shall send notice of its determination thereon to the corporation and state comptroller forthwith." (Added by L. 1917, Chap. 726, in effect June 4, 1917.) (Italics ours.)

This section plainly authorizes a revision only in accordance with the rules laid down in Section 214. For instance, the tax payer might successfully contest before the Commission the valuation placed on its real property and tangible personal property in or out of the State, on its New York or out-of-state bills and accounts receivable, or the proportion of the capital stock of other corporations owned by it,

allocated by the Commission to New York. It will be noted that the record shows that in several of these items the Tax Commission adopted figures different from those reported by the plaintiff (R., pp. 27, 76, 79). As to these the plaintiff might have attempted a revision under this section, and no complaint is here made in regard thereto. Furthermore, the Tax Commission's improper duplication of accounts receivable, referred to in the opinion below (274 Fed. 981; R., p. 47), could doubtless have been remedied by a resort to that body. For this was an error of the Tax Commission and *contrary* to the legislative enactment as construed by the highest court of the State. But beyond such matters the Tax Commission is powerless. It can revise the data, *but not the formula* for the application thereof in the assessment of the tax.

Reference is also made by the Court below to Section 211, subdivision 7, of the Tax Law, providing that, in addition to the data specifically required to be reported by the corporation, such report shall contain "(7) Such other facts as the Tax Commission may require for the purpose of making the *computation required by this Article.*" (Italics ours.)

This provision simply authorizes the Tax Commission to require more detailed information as to the items *specified* in Section 211, as experience shows that same is necessary to insure certainty and prevent fraud.

These suggestions are equally applicable to Section 213, which provides that the Commission may require a further or supplemental report under this article to contain further information and data necessary for the computation of the tax herein provided.

From the text of the statute it is evident that its express provisions for allocation of income are *mandatory,* and that the Tax Commission is without discretion in determining the proportion thereof to be segregated to New York as the measure of the tax.

Section 214 provides, "If the entire business of such corporation be not transacted within the State, the tax imposed by this article *shall be based* upon a proportion of the net income *to be determined in accordance with the following rules.*" (Italics ours.)

It then precisely prescribes the items which are to enter into the calculation. Section 211 (Reports of Corporations to Tax Commission) requires reports only of those items which are named in Section 214 and "(7) Such other facts as the Tax Commission may require for the purpose of making the computation *required* by this Article." (Italics ours.)

This Court will accept the construction of the statute by the highest Court of New York, and that Court in the *Alpha* case, *supra,* held squarely that only those factors expressly provided in the statute may be used in computing the tax or in apportioning income, and that in this respect the Tax Commission has no discretion. Andrews, J., concurring in result, found that the statute was not objectionable as to the bonds because, as he alone thought, the Tax Commission had sufficient discretionary power to exclude interest therefrom in arriving at the total net income of the taxpayer (230 N. Y., at pp. 66-69). The majority opinion (see *ante,* pp. 23-26), however, held that "no assets not included in the enumerated classes are to enter into the

ratio" (p. 52) and "the exclusion of bonds and stocks is the result of an *explicit mandate*" (p. 58). If the exclusion of stocks and bonds from the ratio was mandatory, so is the exclusion of other income-producing factors (Sec. 214). It does not include bonds. Likewise it does not include cash (Secs. 208, 214) or sales except as represented by bills and accounts receivable.

The Tax Commission could not give the plaintiff any relief upon rehearing as to the matters complained of herein and the predicate of Judge Hand's conclusion was shown to be inaccurate.

In *Davis* v. *Wallace*, 257 U. S. 478, it was held that where the part of a statute expressly providing the ratio to be used in ascertaining the measure of an excise tax for foreign railroad companies had been declared unconstitutional, the taxing officers could not use the ratio prescribed for foreign corporations generally. This Court said (p. 485):

> "From what has been said it follows that to sustain the tax in question we should have to hold that the taxing officers, on finding that it could not constitutionally be assessed on the basis specifically prescribed in the statute, were at liberty to assess it on another and different basis which the statute shows was not to be applied to corporations of the class to which these railroad companies belong. Of course, we cannot so hold."

In *Meyer, Auditor of Oklahoma*, v. *Wells Fargo & Co.*, 223 U. S., 298, at page 302, this Court said:

> "Neither the Court below nor this Court can reshape the statute simply because it embraces elements that it might have reached

if it had been drawn with a different measure and intent."

See also:

Commonwealth v. *P. Lorillard Co.*, 105 S. E., 683 (Supreme Court of Appeals of Virginia, January 20, 1921).

POINT V.

The tax in the Bass case is unconstitutional as based on an allocation which includes the value of shares of stocks of other corporations to the extent of 10 per centum only of the real and tangible personal property.

People ex rel. Alpha Portland Cement Co. v. *Knapp*, 230 N. Y. 48.

The plaintiff-in-error reported

"total segregated assets wherever located of.............	$3,212,405.
actual value of shares of stocks of other corporations........	845,195.
a total of....................	4,057,600."

The procedure, upheld below, limited "the value of such shares to ten per centum of the aggregate real and tangible personal property" (Tax Law, Sec. 214, subd. 6), and thereupon "the Commission found

total assets of................	$3,501,483.
assets in New York...........	44,117."

(Opinion below, 232 N. Y., p. 45). (Spacing ours.)

The foregoing provision of Section 214 of the Tax Law, limiting the aggregate value of stocks of other corporations owned by the corporation to 10 per centum of the aggregate real and tangible personal property, had been held unconstitutional in the *Alpha* case above cited; hence, the tax here, in any event, is unconstitutional.

The unconstitutionality and illegality of the tax were fully raised in protests before the Tax Commission prior to the *Alpha* decision (Exhibits D, F, G and I; R., pp. 17, 18, 19, 20 and 21).

POINT VI.

The reasons given in the opinion of the Court of Appeals in the Bass case do not sustain the statute or the tax.

The Court while admitting that the Tax Law made *"the basis of"* the Bass Company's *"taxable net income in New York a portion of its net income earned wholly outside the State"*—acquitted this result of infringement of the Fourteenth Amendment by resort to subjective reasoning. In this respect the Court erred. This concession of an extra-state basis is, of course, the decisive element, as heretofore demonstrated, for the means by which this result is accomplished is immaterial (*International Paper Co.* v. *Mass, supra; Underwood Typewriter Co.* v. *Chamberlain, supra; Wallace* v. *Hines, supra; Shaffer* v. *Carter, supra*).

This applies to all the reasons given by such Court and particularly the interpretation by the Court that the excise is valued on the proportion of its capital employed locally, because the amount

of net income taxable is ascertained by comparison of the local with the total assets (of the classes selected).

The answer is, of course, as made in the *Underwood* case to a similar question of whether the tax was an excise measured by local income or directly upon such income—at page 120:

> "It is contended that the tax violates the Fourteenth Amendment because directly or indirectly it is imposed on income arising from business conducted beyond the boundaries of the State. In considering this objection we may lay on one side the question whether this is an excise tax purporting to be measured by the income accruing from business within the State or a direct tax upon that income, for 'the argument upon analysis resolves itself into a mere question of definitions and has no legitimate bearing upon any question arising under the Federal Constitution.' *Shaffer* v. *Carter*, 252 U. S. 37."

The conceded result is sought to be eluded by disregarding a prior interpretation of the tax as in effect a property tax—directly on income (*Alpha* case)—and construing it a franchise tax, "on the privilege of doing business in the state." This circumstance has just been shown to be immaterial to the inquiry.

Inherent arbitrariness in the statute is disclaimed because the allocation is asserted to be based "upon a comparison of the total assets with the assets in New York." If the Court implied that all assets of the corporation were included in the allocation, it erred, doubtless inadvertently,

for the allocation does not comprehend *all the assets*—in or out of the State. *Cash* and intangibles (save as stocks and receivables appear) are omitted and cash receipts and total gross earnings are given no consideration. In any event, however, such disclaimer amounts to no more than an assertion that a taxing of foreign income is not inherently arbitrary if accomplished by formula. *Fargo* v. *Hart; Meyer, Auditor of Oklahoma,* v. *Wells, Fargo & Co.; Union Tank Line* v. *Wright; Wallace* v. *Hines,* and the *Alpha* case, *supra,* are to the contrary.

The *Union Tank Line* case tersely disposes of this contention (p. 286) as follows:

> "*Under no formula* can a state tax things wholly beyond its jurisdiction."

The Court below denies an unreasonable result because of what it deems to be the moderate sum (an allocation to New York of income amounting to $27,537.68, and a tax thereon of $826.14) assessed

> "in lieu of all other taxes on personal property, capital stock or income. * * * It would on the contrary seem unreasonable thus to exempt relator from taxation on its large though unprofitable business in this state" (citing the *Underwood* case and *Postal Telegraph Cable Co.* v. *City of Fremont,* 255 U. S. 124, 127; R., pp. 42, 62).

In *Looney* v. *Crane,* 245 U. S. 178, at page 190, Mr. Chief Justice White disposes of the "moderate" feature as follows:

> "It is thus manifest on the face of all of the cases, that they in no way sustain the assumption that because a violation of the Constitution was not a large one, it would be sanctioned, or that a mere opinion as to the degree of wrong which would arise if the Constitution were violated, was treated as affording a measure of the duty of enforcing the Constitution."

The "in lieu of" circumstance and any alleged inequity of permitting the company to escape taxation although doing what the Court conceives to be a "large though unprofitable business in this State" (the amount was $240,000 in the Bass case) are likewise immaterial to the inquiry. The tax measure is income, and perforce local income—and the fact that there is no such local measure does not justify a judicial substitution of another. Nor does the fact that the Legislature chose to repeal personal property, capital stock or income taxes when it enacted a tax with an income measure permit the judiciary in effect to revive them or some of them or assess a tax based on what it thinks fair if they were revived—when there is a local lack of the income measure.

As said in *Meyer, Auditor of Oklahoma* v. *Wells-Fargo, supra:*

> "Neither the Court below nor this Court can reshape the statute simply because it embraces elements that it might have reached if it had been drawn with a different measure and intent."

And in *Home Savings Bank* v. *Des Moines,* 205 U. S. 503, at p. 519:

> "But the two kinds of taxes are not equivalent in law, because the State has the power to levy one and has not the power to levy the other. The question here is one of power and not of economics. If the State has not the power to levy this tax, we will not inquire whether another tax which it might lawfully impose, would have the same ultimate incidence."

And in *Davis* v. *Wallace,* 257 U. S. 478, 485:

> "From what has been said it follows that, to sustain the tax in question, we should have to hold that the taxing officers, on finding that it could not constitutionally be assessed on the basis specifically prescribed in the statute, were at liberty to assess it on another and different basis which the statute shows was not to be applied to corporations of the class to which railroad companies belong. Of course we cannot so hold."

The cases cited by the Court below do not sustain the contention.

Underwood Typewriter Co. v. *Chamberlain, supra,* has already been treated (*ante,* pp. 18-19, 26-27).

In *Postal Telegraph Cable Co.* v. *City of Fremont,* 255 U. S. 124, the sole question was whether an annual municipal license tax of $60 for the privilege of doing intrastate telegraph business in a city was an imposition upon the interstate commerce business of the company, because the intrastate earnings were said to be insufficient to pay the tax. *No question of due process was presented.*

But even in this limited and dissimilar inquiry the tax was not validated *on account of its meagre-*

ness or, in the language of the Court of Appeals, because it was "moderate."

It was validated for two reasons: First, that the tax had been paid for twelve years without complaint. Second, because (p. 128):

> "* * * any deficit arising from the tax imposed on the interstate business of the company can be prevented from becoming a burden upon the company's interstate business by an application to the State Railway Commission, under the provisions of Sec. 7409, for an increase of its intrastate rates * * *. The company, as we have seen, cites Sec. 7408 as a compulsion upon it to engage in intrastate business and at designated rates. From the rigor of the requirement, Sec. 7409 provides a mode of relief, and until it is denied, the company cannot complain under the circumstances presented by this record."

No other cases are cited by the learned Court below, and, as we have shown, a long line of authorities of this Court have held that an arbitrary statute, taxing property beyond the jurisdiction of the taxing State, however ingenious its method, and without respect to the amount involved in a particular case, is void as wanting in due process and as a burden upon interstate and foreign commerce.

POINT VII.

The Corporation Tax Law of New York is unconstitutional upon the grounds specified so that in the Bass case the final judgment affirming the determination of the New York State Tax Commission should be reversed; and in the Gorham case the final decree dismissing the complaint upon the merits should be reversed in order that the tax in question may be adjudged void and cancelled of record and the defendants enjoined from its collection.

Dated, New York, March 18, 1924.

Respectfully submitted,

James M. Beck,
George Carlton Comstock,
Robert C. Beatty,
Harold T. Edwards,
Counsel for Plaintiff-in-Error and Appellant.

APPENDIX.

Assignment of Errors

Bass Case.

(Record, pp. 58-60).

First: The Court of Appeals of the State of New York and the Appellate Division of the Third Department erred in affirming the determination of the State Tax Commission and in refusing to vacate the tax imposed against the above-named Bass, Ratcliff & Gretton, Limited, on the ground that the said tax and law under which it was assessed are unconstitutional as in violation of Section 2 of Article 4 and the Fourteenth Amendment, and Section 8 of Article 1 of the Constitution of the United States (Points I to VI, except IV, *supra*, pp. 18-40, 48-54).

Second: The Court erred in not adjudging said tax and the Corporation Tax Law of the State of New York under which it was assessed and imposed against the above-named Bass, Ratcliff & Gretton, Limited, unconstitutional as in violation of Section 2 of Article 4 and the Fourteenth Amendment, and Section 8 of Article 1 of the Constitution of the United States, upon the following grounds:

(a) It taxes a large part of the plaintiff-in-error's net income earned in its business and received by it wholly without the State of New York, and taxes a large amount of its property located without the States of New York (Points I, II and VI, *supra*, pp. 18-39, 49-54).

(b) It taxes a proportionate amount of the net income of a foreign corporation determined by an arbitrary and set rule prescribed in said statute and having no relation to the actual net income of such corporation actually earned in the State of New York, nor the value of the income producing property in the State of New York, and thereby the plaintiff-in-error is unjustly taxed upon a large amount of its net income, all of which so taxed was earned and received wholly in foreign countries (Points I, II and VI, *supra*, pp. 18-39, 49-54).

(c) It directly burdens and lays a tax upon interstate commerce (Point III, *supra*, pp. 39-40).

Third: The Court erred in not holding that the said tax, even though considered as a franchise tax, is unconstitutional as being based upon property and income therefrom without the State of New York (Points I, II and VI, *supra*, pp. 18-39, 49-54).

Fourth: The Court erred in holding that such tax is constitutional, although it is based on an allocation which includes the value of shares of stocks of other corporations owned by Bass, Ratcliff & Gretton, Limited, the plaintiff-in-error, to the extent only of ten (10%) per cent of its tangible real and personal property (Point V, *supra*, pp. 48-49).

Assignment of Errors

Gorham Case.

(Record, pp. 49-51).

1. That the United States District Court for the Southern District of New York erred in dismissing the bill of complaint herein upon the merits by the decree entered the 12th day of August, 1921 (Points I to IV, *supra,* pp. 18-48).

2. That said Court erred in not adjudging the corporation tax assessed by the State of New York against the plaintiff as described in the amended complaint void and ordering its cancellation of record and in not restraining the defendants from collecting the same (Points I to IV, *supra,* pp. 18-48).

3. That said Court erred in not adjudging said tax and the Corporation Tax Law of the State of New York under which it was assessed and imposed against the plaintiff unconstitutional and in violation of Section 2 of Article IV and the Fourteenth Amendment and Section 8 of Article I of the Constitution of the United States upon the following grounds:

a. It taxes a large part of the plaintiff's net income earned in its business and received by it wholly without the State of New York, and taxes a large amount of its property located without the State of New York (Points I and II, *supra,* pp. 18-39).

b. It taxes a proportionate amount of the net income of a foreign corporation determined by an arbitrary and set rule prescribed in said statute and having no relation to the actual net income of such corporation actually earned in the State of New York, nor the value of the income-producing property in the State of New York, and thereby the plaintiff is unjustly taxed upon a very much larger share of its net income than was earned in the State of New York (Points I and II, *supra*, pp. 18-39).

* * * * * * *

h. It directly burdens and lays a tax upon commerce between the different States (Point III, *supra*, pp. 39-40).

CORPORATION TAX LAW OF NEW YORK.

Sections Applicable with 1918 Amendments.

Article 9-A of the Tax Law of the State of New York, Chapter 60 of the Consolidated Laws of New York. Said Article 9-A added thereto by Laws 1917, Chapter 726.

Franchise Tax on Manufacturing and Mercantile Corporations.

Section 208. Definitions. As used in this article, 1. The term "corporation" includes a joint-stock company or association.

2. The words "tangible personal property" shall be taken to mean corporeal personal property, such

as machinery, tools, implements, goods, wares and merchandise, and shall not be taken to mean money, deposits in bank, shares of stock, bonds, notes, credits or evidences of an interest in property and evidences of debt;

3. The term "manufacturing corporation" means a corporation principally engaged in the business of manufacturing tangible personal property for itself or for others;

4. The term "mercantile corporation" means a corporation principally engaged in the business of buying or selling tangible personal property for itself or for others.

(Added by L. 1917, chap. 726, in effect June 4, 1917.)

Section 209. FRANCHISE TAX ON CORPORATIONS BASED ON NET INCOME. For the privilege of exercising its franchises in this state in a corporate or organized capacity every domestic manufacturing and every domestic mercantile corporation, and for the privilege of doing business in this state every foreign manufacturing and every foreign mercantile corporation, except corporations specified in the next section, shall annually pay in advance for the year beginning November first next preceding an annual franchise tax, to be computed by the tax commission upon the basis of its net income for its fiscal or the calendar year next preceding, as hereinafter provided, upon which income such corporation is required to pay a tax to the United States.

(Added by L. 1917, chap. 726, in effect June 4, 1917.)

Section 211. REPORTS OF CORPORATIONS TO TAX COMMISSION. Every corporation taxable under this article as well as foreign corporations having officers, agents or representatives within the state shall annually on or before July first transmit to the tax commission a report in the form prescribed by the tax commission specifying: 1. The name and location of the principal place of business of such corporation, the state under the laws of which organized, and the date thereof; the kind of business transacted.

2. The amount of its net income for its preceding fiscal or the preceding calendar year as shown in the last return of annual net income made by it to the United States treasury department.

3. The average monthly value for the fiscal or calendar year of its real property and tangible personal property in each city, village or portion of a town outside of a village within the state, and the average monthly value of all its real property and tangible personal property wherever located.

4. The average monthly value for the fiscal or calendar year of bills and accounts receivable for (a) tangible personal property sold from its stores or stocks within the state, (b) tangible personal property manufactured or shipped from within the state and (c) services performed within the state, and the average monthly total value for the fiscal or calendar year of bills and accounts receivable for (a) tangible personal property sold from its stores or stocks within and without the state, (b) tangible personal property manufactured or shipped

from within the state and other states and countries, and (c) services performed both within and without the state.

5. The average total value for the fiscal or calendar year of the stock of other corporations owned by the corporation, and the proportion of the average value of the stock of such other corporations within the state of New York, as allocated pursuant to section two hundred and fourteen of this chapter.

6. If the corporation has no real or tangible personal property within the state, the city, village or portion of a town outside of a village in the state in which is located the office in which its principal financial concerns within the state are transacted.

7. Such other facts as the tax commission may require for the purpose of making the computation required by this article.

8. Any corporation taxable hereunder may omit from its report the statement required by subdivisions three to seven, both inclusive, by incorporating in its report a consent to be taxed upon its entire net income.

(Added by L. 1917, chap. 726, in effect June 4, 1917.)

Section 214. (Printed in Brief, *supra*, pp. 8-9.)

Section 215. Rate of tax. The tax imposed by this article shall be at the rate of three per centum of the net income of the corporation or

portion thereof taxable within the state, determined as provided by this article.

(Added by L. 1917, chap. 726, in effect June 4, 1917.)

Sec. 218. REVISION AND READJUSTMENT OF ACCOUNTS BY TAX COMMISSION. If an application for revision be filed with the commission by a corporation against which an account is audited and stated within one year from the time any such account shall have been audited and stated, the commission shall grant a hearing thereon and if it shall be made to appear upon any such hearing by evidence submitted to it or otherwise, that any such account included taxes or other charges which could not have been lawfully demanded, or that payment has been illegally made or exacted of any such account, the commission shall resettle the same according to law and the facts, and adjust the account for taxes accordingly, and shall send notice of its determination thereon to the corporation and state comptroller forthwith.

(Added by L. 1917, chap. 726, in effect June 4, 1917.)

Sec. 219. REVIEW OF DETERMINATION OF TAX COMMISSION BY CERTIORARI. The determination of the commission upon any application made to it by any corporation for revision and resettlement of any account, as prescribed in this article, may be reviewed in the manner prescribed by and subject to the provisions of sections one hundred and ninety-nine and two hundred of this chapter.

(Added by L. 1917, chap. 726, in effect June 4, 1917.)

Sec. 199. Review of determination of tax commission by certiorari. The determination of the commission upon any application made to it by any person, partnership, company, association or corporation for a revision and resettlement of any account, as prescribed in this article, may be reviewed both upon the law and the facts upon certiorari by the supreme court at the instance of any person, partnership, company, association or corporation affected thereby, and in the name and on behalf of the people of the state. For the purpose of such review the commission shall return, on such certiorari, the accounts and all the evidence before it on such application, and all the papers and proofs upon the original statement of such account and all proceedings thereon. If the original or resettled accounts shall be found erroneous or illegal, either in point of law or of fact, by the supreme court, upon any such review, the accounts reviewed shall then be corrected and restated, and from any determination of the supreme court upon any such review an appeal to the court of appeals may be taken by either party.

(Thus amended by L. 1915, chap. 317, in effect April 15, 1915.)

Sec. 200. Regulations as to such writ of certiorari. No certiorari to review any audit and statement of an account or any determination by the commission under this article shall be granted unless notice of application therefor is made within thirty days after the service of the notice of such determination. Eight days' notice shall be given to the commission of the application for such writ. The full amount of the taxes, percent-

age, interest and other charges audited and stated in such account must be deposited with the state treasurer before making the application and an undertaking filed with the commission, in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that if such writ is dismissed or the determination of the commission affirmed, the applicant for the writ will pay all costs and charges which may accrue against him or it in the prosecution of the writ, including costs of all appeals.

(Thus amended by L. 1915, chap. 317, in effect April 15, 1915.)

Sec. 219-c. When tax payable. The tax hereby imposed shall be paid to the state comptroller on or before the first day of January of each year. If such tax be not paid on or before January first, or in the case of additional taxes, within thirty days after the bill for such additional tax has been rendered, the corporation liable to such tax shall pay to the state comptroller, in addition to the amount of such tax, ten per centum of such amount, plus one per centum for each month the tax remains unpaid. Each such tax shall be a lien upon and binding upon the real and personal property of the corporation liable to pay the same from the time when it is payable until the same is paid in full.

(Added by L. 1917, chap. 726, in effect June 4, 1917.)

Sec. 219-d. Corrections and changes. If the amount of the annual net income of any corporation taxable under this article as returned to the

United States treasury department is changed or corrected by the commissioner of internal revenue or other officer of the United States or other competent authority, such corporation ,within ten days after receipt of notice of such change or correction, shall make return under oath or affirmation to the tax commission of such changed or corrected net income. The tax commission shall compute the taxes which, in view of such change or correction, would be due from such corporation for the fiscal or calendar year for which such change or correction is made. If from such computation it appears that such corporation shall have paid under this article an excess of tax for the year for which such computation is made, the tax commission shall return a statement of the amount of such excess to the comptroller, who shall credit such corporation with such amount. Such credit may be assigned by the corporation in whose favor it is allowed to a corporation liable to pay taxes under this article, and the assignee of the whole or any part of such credit on filing with the commission such assignment shall thereupon be entitled to credit upon the books of the comptroller for the amount thereof on the current account for taxes of such assignee in the same way and with the same effect as though the credit had originally been allowed in favor of such assignee. If from such computation it appear that an additional tax is due from such corporation for such fiscal or calendar year, such corporation shall, within thirty days after notice has been given as provided in section two hundred and nineteen-b of this chapter by the tax commission, pay such additional tax.

(Added by L. 1917, chap. 726, in effect June 4, 1917.)

Sec. 219-e. WARRANT FOR THE COLLECTION OF TAXES. If the tax imposed by this article be not paid within thirty days after the same becomes due, unless an appeal or other proceeding shall have been taken to review the same, the comptroller may issue a warrant under his hand and official seal directed to the sheriff of any county of the state commanding him to levy upon and sell the real and personal property of the corporation owning the same, found within his county, for the payment of the amount thereof, with the added penalties, interest and the cost of executing the warrant, and to return such warrant to the comptroller and pay to him the money collected by virtue thereof by a time to be therein specified, not less than sixty days from the date of the warrant. Such warrant shall be a lien upon and shall bind the real and personal property of the corporation against whom it is issued from the time an actual levy shall be made by virtue thereof. The sheriff to whom any such warrant shall be directed shall proceed upon the same in all respects, with like effect, and in the same manner as prescribed by law in respect to executions issued against property upon judgments of a court of record, and shall be entitled to the same fees for his services in executing the warrant, to be collected in the same manner.

(Added by L. 1917, chap. 726, in effect June 4, 1917.)

Sec. 219-f. ACTION FOR RECOVERY OF TAXES: FORFEITURE OF CHARTER BY DELINQUENT CORPORATIONS. Action may be brought at any time by the attorney-general at the instance of the comptroller, in the name of the state, to recover the amount of any

taxes, penalties and interest due under this article. If such taxes be not paid within one year after the same be due, and the comptroller is satisfied that the failure to pay the same is intentional he shall so report to the attorney-general, who shall immediately bring an action in the name of the people of the state, for the forfeiture of the charter or franchise of any corporation failing to make such payment, and if it be found that such failure was intentional, judgment shall be rendered in each action for the forfeiture of such charter and for its dissolution if a domestic corporation and if a foreign corporation for the annulment of its franchise to do business in this state.

(Added by L. 1917, chap. 726, in effect June 4, 1917.)

Section 219-j. MANUFACTURING AND MERCANTILE CORPORATIONS EXEMPT FROM PERSONAL PROPERTY TAX AND FROM THE PROVISIONS OF SECTIONS TWELVE, TWENTY-SEVEN, ONE HUNDRED AND EIGHTY-TWO AND ONE HUNDRED AND NINETY-TWO OF THE TAX LAW. After this article takes effect manufacturing and mercantile corporations shall not be assessed on any personal property which for the purpose of this exemption shall include such machinery and equipment affixed to the building as would not pass between grantor and grantee as a part of the premises if not specifically mentioned or referred to in the deed, or as would, if the building were vacated or sold, or the nature of the work carried on therein changed, be moved, except boilers, ventilating apparatus, elevators, gas, electric and water power generating apparatus and shafting. After this article takes effect manufacturing and mercantile

corporations shall not be assessed or taxed upon their capital stock as provided for in section twelve of this chapter, nor shall they be required to pay the franchise tax imposed by section one hundred and eighty-two of this chapter, nor to make the reports called for in sections twenty-seven and one hundred and ninety-two of this chapter. Nothing herein shall be construed to impair the obligation to pay franchise taxes due on or before the fifteenth day of January, nineteen hundred and seventeen, or taxes on personal property or capital stock assessed in the year nineteen hundred and sixteen or in the year nineteen hundred and seventeen before this article takes effect, whether payable in that year or not. But if any manufacturing or mercantile corporation shall pay taxes on personal property or capital stock assessed in any tax district in the year nineteen hundred and seventeen, such corporation shall be entitled to credit for the amount of such taxes so paid on its account for taxes first assessed against it under this article by the tax commission, not exceeding, however, the amount of such first assessment.

(Added by L. 1917, chap. 726, in effect June 4, 1917.)

Amendments of 1918, Chapters 271, 276 and 417 to the foregoing sections.

Section 208, subdivisions 3 and 4, defining "manufacturing corporations" and "mercantile corporations" are omitted by the amendment Laws of 1918, Chapter 417.

Section 209. (Printed in Brief, *supra*, pp. 7-8.)

NOTE: Chapter 276 of the Laws of 1918, amending the above Section 209, contains this provision:

> "Sec. 5. The sections of such chapter amended by this act shall be construed as having been in effect, as so amended, as of the date of the original enactment of article nine-a of the tax law, as added by chapter seven hundred and twenty-six of the laws of nineteen hundred and seventeen."

Section 211. REPORTS OF CORPORATIONS TO TAX COMMISSION. Every corporation taxable under this article as well as foreign corporations having officers, agents or representatives within the state shall annually on or before July first, or within thirty days after the making of its report of net income to the United States treasury department for any fiscal or calendar year, transmit to the tax commission a report in the form prescribed by the tax commission specifying: 1. The name and location of the principal place of business of such corporation, the state under the laws of which organized, and the date thereof; the amount of its issued capital stock and the kind of business transacted.

2. The amount of its net income for its preceding fiscal or the preceding calendar year as shown in the last return of annual net income made by it to the United States treasury department, and if the corporation shall claim that such return is inaccurate, the amount claimed by it to be the net income for such period.

3. The average monthly value for the fiscal or calendar year of its real property and tangible personal property in each city, village or portion of

a town outside of a village within the state, and the average monthly value of all its real property and tangible personal property wherever located.

4. The average monthly value for the fiscal or calendar year of bills and accounts receivable for (a) personal property sold by the corporation from merchandise manufactured by it within this state; (b) personal property sold by the corporation from merchandise owned by it and located within the state at the time of the acceptance of the order, but not manufactured by it within this state; and (c) services performed, based on all orders received at offices maintained by the corporation within this state, excluding bills and accounts receivable arising from sales made from a stock of merchandise or other property located at a place of business maintained by the reporting corporation within this state. Also the average total monthly value for the fiscal or calendar year of bills and accounts receivable for (a) personal property sold by the corporation from merchandise manufactured by it within and without the state; (b) personal property sold by the corporation from merchandise owned by it at the time of the acceptance of the order but not manufactured by it; and (c) services performed, based on orders received at offices maintained by the corporation, excluding bills and accounts receivable on orders filled from a stock of merchandise or other property maintained by the reporting company. In case of a corporation organized under the laws of another country a statement shall be made showing its entire net income.

6. If the corporation has no real or tangible personal property within the state, the city, village

or portion of a town outside of a village in the state in which is located the office in which its principal financial concerns within the state are transacted.

7. Such other facts as the tax commission may require for the purpose of making the computation required by this article.

8. Any corporation taxable hereunder may omit from its report the statements required by subdivisions four and five by incorporating in its report a consent to be taxed upon its entire net income.

(Added by L. 1917, chap. 726; thus amended by L. 1918, chap. 417, in effect May 1, 1918.)

Section 214. COMPUTATION OF TAX. If the entire business of the corporation be transacted within the state, the tax imposed by this article shall be based upon the entire net income of such corporation for such fiscal or calendar year as returned to the United States treasury department, subject, however, to any correction thereof for fraud, evasion or error, as ascertained by the state tax commission.

If the entire business of such corporation be not transacted within the state, the tax imposed by this article shall be based upon a proportion of such ascertained net income, to be determined in accordance with the following rules:

The proportion of the net income of the corporation upon which the tax under this article shall be based, shall be such portion of the entire net income as the aggregate of

1. The average monthly value of the real property and tangible personal property within the state,

2. The average monthly value of bills and accounts receivable for (a) personal property sold by the corporation from merchandise manufactured by it within this state; (b) personal property sold by the corporation from merchandise owned by it and located within the state at the time of the acceptance of the order, but not manufactured by it within this state; and (c) services performed within this state, excluding bills and accounts receivable arising from sales made from a stock of merchandise or other property located at a place of business maintained by the reporting corporation without this state,

3. The proportion of the average value of the stocks of other corporations owned by the corporation, allocated to the state as provided by this section, but not exceeding ten per centum of the real and tangible personal property segregated to this state under this article, bears to the aggregate of

4. The average monthly value of all the real property and personal property of the corporation, wherever located,

5. The average total value of bills and accounts receivable for (a) personal property sold by the corporation from merchandise manufactured by it within and without this state; (b) personal property sold by the corporation from merchandise owned by it at the time of acceptance of the order but not manufactured by it; and (c) services performed both within and without this state, based on orders received at offices maintained by the corporation, excluding bills and accounts receivable on orders filled from a stock of merchandise or other property maintained by the corporation,

6. The average total value of stocks of other corporations owned by the corporation, but not exceeding ten per centum of the aggregate real and tangible personal property set up in this report.

Real property and tangible personal property shall be taken at its actual value where located. The value of share stock of another corporation owned by a corporation liable hereunder shall for purposes of allocation of assets be apportioned in and out of the state in accordance with the value of the physical property in and out of the state representing such share stock.

It is further provided that every domestic corporation exercising its franchise in this state and every foreign corporation doing buisness in this state, other than those exempted by section two hundred and ten of this chapter, shall be subject to a minimum tax of not less than ten dollars and not less than one mill upon each dollar of the apportionment of the face value of its issued capital stock apportioned to this state, which shall be determined by dividing the amount of the real and tangible personal property in this state by the entire amount of the real and tangible personal property as shown in the report, and multiplying the quotient by the face value of the issued capital stock. If such a corporation has stock without par value, then the base of the tax shall be on such a portion of its paid in capital as its real and tangible personal property in this state bears to its entire real and tangible personal property.

(Added by L. 1917, chap. 726; thus amended by L. 1918, chaps. 276, 417, in effect May 1, 1918.)

NOTE: Chapter 276 of the Laws of 1918 amended the above Section 214, and such Act contains the retroactive provision quoted, *supra,* under Section 209. This Section 214 was, however, again amended in 1918 by Chapter 417 of the Laws of 1918, which re-enacts the whole section with numerous amendments to its phraseology and repeats so much of the amendments in Chapter 276 as remained unchanged. This second amendment to this Section 214, contained in Chapter 417, has no retroactive provision.

Sections 215, 218, 219-e and 219-f. (Not amended in 1918.)

Section 219 was amended by Laws of 1918, chapter 417, so as to incorporate Section 200, and substituting the words "State Comptroller" for "State Treasurer."

Section 219-c was amended by Laws of 1918, chapter 271. The amendments are not material to the issues herein involved.

Section 219-d. CORRECTIONS AND CHANGES. If the amount of the net income for any year of any corporation taxable under this article as returned to the United States treasury department is changed or corrected by the commissioner of internal revenue or other officer of the United States or other competent authority, such corporation, within ten days after receipt of notice of such change or correction, shall make return under oath or affirmation to the tax commission of such changed or corrected net income, and shall concede the accuracy of such determination or state wherein it is erroneous.

The tax commission shall ascertain, from such return and any other information in the posses-

sion of the commission, the net income of such corporation for the fiscal or calendar year for which such change or correction has been made by such commissioner of internal revenue or other officer or authority. All the authority conferred on the tax commission by the provisions of section one hundred and ninety-five of this chapter is hereby granted to it in respect to the ascertainment of such net income. The tax commission shall thereupon reaudit and restate the account of such corporation for taxes based upon the net income for such fiscal or calendar year, such reaudit to be according to the net income so ascertained by the tax commission. The proceedings and determination of the tax commission in the making of such reassessment may be revised and readjusted and reviewed in the manner provided by sections two hundred and eighteen and two hundred and nineteen of this chapter, as in the case of an original assessment of the tax. If from such reassessment it appears that such corporation shall have paid under this article an excess of tax for the year for which such reassessment is made, the tax commission shall return a statement of the amount of such excess to the comptroller, who shall credit such corporation with such amount. Such credit may be assigned by the corporation in whose favor it is allowed to a corporation liable to pay taxes under this article, and the assignee of the whole or any part of such credit on filing with the commission such assignment shall thereupon be entitled to credit upon the books of the comptroller for the amount thereof on the current account for taxes of such assignee in the same way and with the same effect as though the credit had originally

been allowed in favor of such assignee. If from such reassessment it appears that an additional tax is due from such corporation for such year, such corporation shall, within thirty days after notice has been given as provided in section two hundred and nineteen-b of this chapter by the tax commission pay such additional tax.

(Added by L. 1917, chap. 726; thus amended by L. 1918, chap. 276, in effect April 19, 1918.)

Note: L. 1918, ch. 276, Sec. 5. The sections of such chapter amended by this act shall be construed as having been in effect, as so amended, as of the date of the original enactment of article nine-a of the tax law, as added by chapter seven hundred and twenty-six of the laws of nineteen hundred and seventeen.

Section 219-j. Exemptions from certain other taxation. After this article takes effect, corporations taxable thereunder shall not be assessed on any personal property or capital stock, as provided for in section twelve of this chapter, except for taxes levied for the fiscal year ending December thirty-first, nineteen hundred and seventeen, in taxing districts in which the fiscal year is coterminous with the calendar year; and where taxes are required by law to be levied for local purposes for a fiscal year beginning in nineteen hundred and seventeen and ending in nineteen hundred and eighteen, such corporations shall not be assessed on any personal property or capital stock, as provided for in section twelve of this chapter, except for taxes levied for such fiscal year. * * *

(Added by L. 1917, chap. 726; thus amended by L. 1918, chap. 271, in effect April 19, 1918.)